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SUGGESTIONS OF AMENDMENTS TO THE BANKRUPT ACT.

THE principal defects of the present Bankrupt Act may be arranged under the following heads:—

First. Payment of the services of registers (in whom are vested *quasi* judicial functions), by fees instead of salaries.

Second. The method of selecting assignees, and the consequent great waste of the estate pending the delay in their appointment.

Third. The absence of provisions for carrying into effect settlements of the bankrupt's estate by way of compromise or composition offered by the debtor, when the assent of a certain percentage in number and value of the creditors shall have been obtained thereto, *notwithstanding* the dissent of the other creditors.

1. The business in the Courts of Bankruptcy is insufficient to require the present number of registers. In a few of the judicial districts, those embracing large commercial cities, the services of not more than one-fourth of the present number are required; while in the more sparsely populated districts one or two registers by a proper arrangement of the business—attendance at different places in the district at stated times—could conveniently render all the necessary assistance to the district judge contemplated by the present provisions for a register in each congressional district.

The amount of salary would of course vary with the different districts, analogous to the salaries of the district judges. It might be very properly determined by the judge of the Supreme Court allotted to the particular circuit of which the district forms a part, the circuit judge, and the district judge. Their joint recommendation, after consultation, could be submitted to the appropriate congressional committees. The intimate acquaintance of these judges (especially that of the district judge) with the nature and amount of the business would enable them to determine a standard of compensation, much more satisfactory to both creditors and officers, and much more equitable than that of the present inconsistent and uncertain fee-bill. The abuses of the present system in this respect would be rendered impossible, and the independence of the official, obviously necessary to an impartial performance of his duties, promoted.

As the most onerous portion of the register's duties is that which is to a great extent merely clerical, an allowance of a certain sum for clerk-hire per annum might be separately estimated or included in the salary recommended. The compensation for taking testimony (including depositions for proofs of claims) might remain as at present provided for in the fee-bill, as such a service could not be properly estimated by a fixed annual compensation. In those districts where the register would be required to attend at different places, of course some method of estimation of travelling expenses could readily be suggested.

The consolidation of the different congressional districts (similar to that which has recently taken place with reference to the internal revenue collection districts) could also be judiciously determined by the joint recommendation of the judge of the Supreme Court allotted to the circuit, the circuit judge and the district judge. They might also designate which of the present registers should be allotted to the new districts thus formed. Perhaps any consolidation might be altogether dispensed with, a reduction of the present number of registers being all that would be requisite.

The government should, from its general resources, provide for the salaries suggested; but if this be seriously objected to, a tax of one-half per cent. on the assets of bankrupts' estates would probably be found sufficient to meet the necessary expenditures on this account.

2. The assignee is the most important officer of the Court of

Bankruptcy. The amount of dividend payable out of the bankrupt's estate must necessarily depend, in a great measure, upon his ability, honesty and promptitude. The present method of his election by the creditors has proved very inefficient. They have not generally, either from disinclination, or inability by reason of business engagements, given that attention and consideration to the matter, which is necessary to secure a proper selection. The assignee elected by them has generally conceived it to be his first duty to submit himself as a mere automaton to the direction of counsel, instead of proceeding in a business-like manner to administer the estate to the best of his skill and judgment, as men would ordinarily proceed in matters in which their own interests only are concerned, which is all that is really required of him, and is in effect the legal standard of his duty.

The delays thus arising, and consequent waste of the estate, are notorious. No legislative provisions can insure, in all cases, the selection of a capable assignee, but the present method has been fully tried; and the experience of judges, registers and creditors will justify the assertion, that in the majority of cases, the choice of the creditors has not been such as to insure an economical and speedy administration of the estate.

Then again, apart from the objections just stated, the present provisions cause a delay of from four to eight weeks, during which time, charges for rent, storage, custody, &c., accumulate, the collection of debts due the estate is rendered more difficult, in many cases impossible, and by far the most valuable time for the preservation of the most important interests, is lost. It is however very difficult to suggest a substitute for the present plan, such as will avoid the objections stated and not be open to others less palpable, but in the end, more insidious and inimical to the interests of the creditors. Undoubtedly there should be an assignee, provided immediately upon the adjudication being made. How shall he be selected?

The following is suggested as a method which would probably accomplish the end desired, and at the same time preserve as far as necessary, the obvious rights of creditors to have a voice in the choice of their agent. Let the district judge be authorized to appoint an assignee immediately upon the adjudication being made (in both voluntary and involuntary cases), who shall be removable and another assignee elected by the majority in number and value

of the creditors, whose claims shall have been proved, if they shall so determine, at the first meeting of creditors to be called and held in the manner now provided; the action of the creditors as to such removal to be entirely without qualification as to requiring the existence or assignment of any cause.

To this it might be objected that the appointment would become an official one, and liable to all the abuses of official patronage. This is one of its dangers, but is not that sufficiently guarded against by the power of removal given to the creditors? The action of the district judge might also be further restricted by a provision forbidding the appointment of the same person as assignee in more than a certain number of cases (at the same time) in which the assets remained undistributed.

The provisions in regard to security might be safely left as at present, proper depositories for funds being selected and the counter signature of the register to the checks thereon being required. The fear of removal would exercise a salutary influence in spurring on the appointee of the district judge to prompt and vigilant action.

3. Settlements equitable and beneficial alike to the creditors and debtor, have been prevented, and ultimately unprofitable bankruptcy proceedings forced upon all the creditors, by reason of creditors, to a very inconsiderable amount, refusing their consent, from very proper motives probably in some cases, but often with the selfish hope of having their claims purchased at a higher rate than the proposed settlement or having some arrangement made with the debtor, directly or indirectly, by which they would receive more than the other creditors. Section 43d of the present act would seem, at first glance, to have been intended to provide for the difficulty suggested, but the phraseology employed in describing the duties and powers of the trustees and committee, does not seem to make any essential change of method of administration from that of an assignee, and such has been the weight of judicial construction of the section. Instead, therefore, of the 43d section, let there be substituted a section providing that either before or after the adjudication, upon the petition of the debtor or any one or more of the creditors, alleging a proposed settlement, to which three-fourths in number and value of the creditors have in writing consented, that it shall be the duty of the register to direct that a meeting be held before him, of which

due notice (setting forth substantially the proposed settlement) by mail and publication shall be given to all the creditors, at which meeting, objecting creditors may be heard, the expediency and propriety of the said settlement or otherwise to be reported by the register to the court, who shall, if the settlement appear to be beneficial to all the creditors, order the proceedings in bankruptcy to be superseded and the settlement carried into effect, the jurisdiction of the Court of Bankruptcy however, as to staying suits at law as provided for in the 21st section of the present act (a jurisdiction obviously necessary for protecting the settlement), to be retained and exercised (upon the application of the debtor or any of the creditors) at *all times* thereafter in case the settlement provides for the release of the debtor, and for a period of say *one year only* after the order made, in case the settlement does not so provide. It might also be provided that if the settlement proposed should appear to have received the written assent of *four-fifths* (or probably a larger proportion) of the number and value of the creditors, that on the report of the register to that effect, and without regard to whether in the opinion of the court or register, said settlement might be deemed advisable or otherwise (provided, of course, that it contemplate equality of distribution), an order should be made, authorizing the same as before suggested. Of course, when a release is stipulated for in the settlement, the provisions suggested would practically insure the discharge of the debtor; but where it is not, the right of suit of a dissenting creditor is no longer delayed than at present during the pendency of bankruptcy proceedings. The benefits to be derived to creditors generally would greatly offset the loss to the dissenting creditors of a possibly imprudently granted release, which might, in some instances, be in this way obtained. Amendments carrying into effect the foregoing suggestions would, it is conceived, obviate partially, the two great objections to the Bankrupt Act as at present administered, viz. delay and expense. There are, however, some others which it is believed could be advantageously adopted, which would greatly facilitate the speedy and economical settlement of bankrupts' estates. The compensation of the assignee, the measure of which is very indefinitely stated in the present act, there being two clauses in regard to it—one providing for a *reasonable* compensation in the discretion of the court, and the other for a percentage on moneys received and paid out by

him, which latter, if intended as the criterion of the former, is certainly very inadequate to the proper remuneration of a capable assignee.

The practical effect has been that the amount paid out of the estate directly to the assignee, or indirectly through him to other persons, for services which should be rendered by him personally, or at his expense, has been, in the aggregate, far in excess of what ought to be allowed for the performance of his *whole* duty. An assignee who properly and speedily settles an estate should be well paid. Upon all principles of business economy this is to the interest of the creditors. Except in extraordinary cases, the amount can be adjusted much more definitely than by the present provisions. The rules of the courts of equity of some of the states furnish a fair analogy for its determination.

A graduated percentage, varying according to the amount collected, could be made the standard; say for instance, ten per cent. on the first thousand dollars, nine on the second, eight on the third, seven on the fourth, and six on the fifth, five on the next fifty thousand, and three (or four) on any additional sum. The percentage suggested may seem large and much more liberal than is given to trustees, executors or administrators in some of the states, but with the following qualifications as to allowance of *counsel fees* and *legal expenses*, would diminish the amount of the fund for distribution among the creditors, much less than the present practice of allowances to assignees. If the commission suggested should be received, the assignee should not be allowed anything additional out of the estate for counsel fees or legal expenses (except the necessary expenses of the bankruptcy proceedings proper), except in extraordinary cases, when such additional allowance might be obtained preliminarily upon the assent in writing thereto of a majority in number and value of the creditors whose claims should appear to the register from the schedules or otherwise to be proper claims against the estate, whether the same should have been formally proved or not, such assent to be a condition precedent to the counter-signature of the check therefor by the register; but such payment nevertheless to be subject to the final auditing of the assignee's account. If the assignee does not obtain the assent of the creditors as just stated, any additional sum which he may deem necessary to be paid on this account, if properly paid by him, should of course be refunded out of the

estate, but only after the same should have been duly allowed at a general meeting of creditors.

The percentage suggested would seem to be ample, however, in most cases to indemnify the assignee for expenses incurred for the professional advice and assistance ordinarily required, and also compensate him for his own services. Provisions in conformity with these suggestions, it is obvious, would materially reduce the charges now made against estates and the great delay consequent upon needless recourse to professional assistance and advice, in regard to matters which the assignee should proceed to adjust promptly, according to his own judgment and the exigencies of the particular case.

In case the assignee appointed by the court be removed by the creditors at the first meeting, probably but one-half or three-fourths of the foregoing suggested commissions should be allowed him in the discretion of the court, and one-fourth thereof to the substituted assignee on the moneys received by him from his predecessor. Some equitable apportionment to prevent duplication of charges in this respect should, at all events, be adopted. The amount of counsel fees to the petitioning creditor and the bankrupt's solicitor should also be definitely determined. It is reasonable that the creditor who institutes proceedings for the common benefit, should not be charged with the entire expense necessarily preliminarily incurred, but the abuse of the application of this principle calls for an arbitrary determination of the amount. In ordinary cases of involuntary bankruptcy, a docket fee of twenty-five dollars, and in extraordinary cases (to be determined by the certificate of the district judge to that effect), a docket fee of fifty dollars should probably be allowed out of the estate to the counsel of the petitioning creditor. Similar fees might be allowed the solicitor of the bankrupt, but whatever may be the amount fixed upon, in no cases should additional allowances be made out of the estate.

The present act could also be advantageously amended in regard to the provisions as to calling meetings of creditors for distribution of the estate and the method of declaring dividends. After the expiration of three months from the first meeting of creditors, upon the written application of any creditor to an amount exceeding three hundred dollars, the register should be expressly empowered to require the assignee to call a meeting of creditors and to make report of the condition of the estate. If at such meeting,

in the opinion of the register, a dividend equal to or exceeding five per cent. could be properly declared, or as much greater as in his opinion (his determination to be subject of course to exceptions) the amount collected will warrant, it shall be his duty to declare said dividend accordingly, the payment of the same to be suspended as to disputed claims. This is partly provided for in the XIX General Order, but the method just suggested would give any one of the creditors an additional opportunity to speed the proceedings.

It will be seen that the foregoing suggestions do not contemplate any essential change in the *principles* embodied in the present act. Of their justice and wisdom none can reasonably complain. Indeed the main objects of such a law, being as well the prevention of the receipt by a favored creditor of the whole of the debtor's estate, if his claim be equal thereto (as in the absence of a bankrupt act is the result in most of the states), as the manifold fraudulent dispositions of property, which cannot be effectually avoided by the judicial tribunals of the respective states, commend themselves as most equitable and desirable to be accomplished; but the unsatisfactory administration of the law, the theoretical equality of distribution contemplated, practically exemplifying itself in an utter dissipation of estates in charges and expenses, has so exhausted the patience of the mercantile community, that the relegation of the whole subject of insolvency to its former condition, is coming to be considered a lesser evil than that which results from the present system. It is feared that unless some plan be devised to correct its abuses, Congress, influenced by the strong popular feeling on the subject, will hastily and improvidently repeal the present act.

The injustice of the former condition of things will then at once be tenfold more apparent than before the enactment, and in a few years would doubtless necessitate the passage of another law; but the inexpediency of such a course is plainly obvious. What is needed is economy and promptness of settlement.

An appreciable dividend, and that without delay, is what the creditor demands, and what, in most cases, he should receive.

The foregoing observations are the result of considerable experience, and information derived from creditors and officials. They are respectfully submitted for the consideration of merchants especially, with the hope, at least, that such an interest

may be awakened in the matter, as will by these or some other measures, rescue a law, just and beneficent in its principles, from the disastrous results of its inefficient methods of administration.

The advantages proposed to be gained by the amendments suggested are, in brief, the insuring a greater impartiality and independence of action of the assistant judicial officers; the dispensing with the unnecessary and extraordinary charges now incurred during a period in which all interests imperatively call for immediate action, instead of most expensive and wasteful inactivity; a reasonably definite determination of the amount of legal expenses, and an opportunity to creditors and debtor amicably to adjust settlements, undisturbed by the dictation of mercenary malcontents and free from the trammels of official forms. J. M.

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

THE EAST SAGINAW STREET RAILWAY CO. *v.* AUGUST BOHN, SUING BY HIS NEXT FRIEND.

It is the duty of a street railway company to provide vehicles which insure security to their passengers, and not to suffer them to occupy unsafe places upon such vehicles.

If this duty is neglected and a passenger is injured, he cannot recover damages of the company if his own neglect of the duty of self-preservation contributed to the injury.

But duty can only be predicated of one who has capacity to understand and ability to perform it. Therefore, a child not of an age or discretion to understand the danger in riding upon the front platform of a street car, cannot be charged with negligence in so doing.

Parents have a right to assume that street railway companies furnish conveyances which are reasonably safe, and have regulations which preclude persons riding in unsafe places upon them. They cannot, therefore, be charged with negligence in permitting their children to ride on the street cars without escort if the company consent so to receive them.

While a street railway company would not be liable to a person of suitable discretion who, being warned of the danger in riding upon the front platform of the car, should persist in doing so, yet in the case of a person lacking such discretion, and to whom consequently negligence could not be imputed, it would be the duty of the company not to stop with a warning, but to compel such person to occupy the proper place in the car.

A child four and a half years of age took a street car with his brother eight years older, and both sat down on the front platform with their feet on the step. The conductor took the fare and says he told the boys to go into the car; but this